ORIGINAL

NO. 90-6105

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1990

JOHN H. EVANS, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

1. The United States concedes there is a conflict between the circuits with respect to the requirement of "inducement" under the Hobbs Act with the Second and Ninth Circuits holding, en banc, that inducement is required. United States v. Aguon, 851 F.2d 1158, 1167 (9th Cir. 1988) (en banc); United States v. O'Grady, 742 F.2d 682, 684 (2d Cir. 1984) (en banc). The government concludes, however, that this conflict "has little practical significance" since in the instant case the petitioner was not "passive." (Resp. 9-11)

Whether or not the petitioner was "passive" mischaracterizes the issue. The statute defines "extortion" as the obtaining of property from another, with his consent, induced * * * under color of official right." 18 U.S.C. § 1951(b)(2). The issue is whether the defendant "induced" a campaign contribution under color of office, not whether Evans was passive or not passive (Resp. 11) in his conversation with the undercover agent.[1] If Evans "induced" or required such a payment he runs afoul of the Hobbs Act. The

[1] Both in its Statement of Facts and in Argument, the government intimates that Evans was requesting a campaign contribution when he said, "Well, let me tell you. I, it's cause, see you don't know how I operate. What I'm, what I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to handle of that." (Resp. 4, 11). Taken in context the conversation reveals just the opposite is true. Evans was responding to the agent's statement that he needed Evans' help and influence. Evans' statement beginning with, "it's cause, see you don't know how I operate" was Evans' way of telling the agent that he was not pressuring him for a contribution and that Evans' help would be no different regardless of any amount Cormany chose to give. See generally, defendant's Petition, 9-12.

evidence showed that Evans did not induce the payment nor ever indicate that payment was necessary for any service that he would provide under color of office.

The Eleventh Circuit adds its own gloss to the statute by eliminating "inducement" from the Hobbs Act altogether with its legislative-like pronouncement that "the requirement of inducement is automatically satisfied by the power connected with the public office." United States v. Evans, 910 F.2d 790, 796-797 (11th Cir. 1990).

2. The government argues further that "[t]he jury instructions also required the jury to find inducement on petitioner's part." (Resp. 11) The jury instruction did not require inducement. The government goes on to explain that a "quid pro quo arrangement" is a substitute for inducement. (Resp. 11) However, the statute does not speak of a quid pro quo. On the contrary, as the Fifth Circuit teaches, "[s]uch a quid pro quo may, of course, be forthcoming in an extortion case, or it may not. In either event, it is not an essential element of the crime." United States v. Dozier, 672 F.2d 531, 540 (5th Cir. 1982), citing United States v. Trotta, 525 F.2d 1096, 1100 (2nd Cir. 1975), cert. den. 425 U.S. 971, 96 S. Ct. 2167 (1976). The issue is not whether Evans agreed to a campaign contribution in exchange for a service of his office; it is whether Evans "induced" the campaign contribution. The instruction to the jury must so indicate. Here, it did not.

The jury instruction stated in no uncertain terms that the defendant was guilty of a Hobbs Act violation if he "accepts money

in exchange for [a] specific requested exercise of his * * * official power." (Petition, 20-21) This instruction authorized the jury to convict of a Hobbs Act violation if the jury believed money was exchanged for a requested service. Thus, the undercover agent offered Evans money for his campaign and simultaneously made a request of Evans for an exercise of official power to make it appear that the two were linked. Not only did this instruction ignore any requirement of inducement on Evans' part, it effectively required Evans to affirmatively disassociate himself from the agent's request at the time he accepted the campaign contribution or risk conviction. Cormany well knew Evans was willing to assist him when he asked for Evans' help as Evans had already been assisting Cormany for over a year and had never initiated a request for a contribution. See Petitioner's Statement of Facts, pp. 5-12. Evans was guilty of poor judgment, but not of inducing the contribution.[2]

3. Petitioner does not wish the Court to "hold this case for McCormick v. United States" (Resp. 12) but rather to set this case down for argument as it presents issues in addition to those presented in McCormick.

Respectfully submitted,

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Attorney for Petitioner

[2] The district court instruction also focused the jury's attention on the "request" of the undercover agent, not the intent of Evans. The Eleventh Circuit affirmed that view. See defendant's Petition, 21-23.

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Reply to Brief in Opposition by depositing the document in the United States Postal Service with first-class postage prepaid, addressed to counsel of record at the following address:

Hon. Kenneth W. Starr
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Dated this 4 day of January, 1991.

C. Michael Abbott
Counsel of Record